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March 4, 2004

The Honorable Michael K. Powell
Chairman, Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *Ex Parte – In the Matter of Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television,*
MB Docket No. 03-15, RM 9832

Dear Chairman Powell:

On behalf of EchoStar Satellite LLC ("EchoStar"), this letter expands on a previous proposal made by EchoStar to speed up the long-awaited transition of television broadcasters from analog technology to digital television ("DTV") *and* ensure that the conversion results in actual DTV service being received by as many consumers as possible.¹ To achieve these goals, the Commission should (a) require all network stations that have not completed construction of DTV facilities to grant waiver requests that will allow consumers in the relevant Designated Market Area ("DMA") to receive, by satellite, the High Definition ("HD") feed of the network in question; and (b) require all network stations that fail to replicate their analog Grade B contours to grant such waivers for households predicted as served by the station's analog signal but outside the station's community of license.

The proposal to impose these requirements is in the public interest. The proposed requirement for broadcasters that have failed to even build any DTV facilities is even more warranted today than it was when EchoStar first made the suggestion in 2001 because of developments in the multichannel video programming distribution ("MVPD") market. In particular, the increasing market share of Direct Broadcast Satellite ("DBS") distributors (which

¹ See Letter from Charles W. Ergen, President and Chief Executive Officer, EchoStar Satellite Corporation, to Michael K. Powell, Chairman, FCC (dated Sept. 27, 2001).

today cannot provide local DTV stations)² has made it easier for broadcasters to obtain extensions of the DTV transition deadlines than Congress had originally anticipated under the 85% two-prong standard that it established in 1996. This makes it all the more important to bolster consumer adoption of DTV sets (the other prong of the 85% test) and avoid a broader ability to delay the transition than Congress had counted on.

As to the proposed requirement for broadcasters that do not replicate their Grade B contour, it will help reduce the serious risk that the digital build-out will be in name only, resulting in *no* actual reception of DTV service for many consumers living inside these stations' Grade B contour but outside their community of license. Many broadcasters throughout the nation have chosen to comply with the digital construction deadlines by building low-power transmitters that are intended to serve their community of license, but are not adequate to serve their entire Grade B contour.³ Imposing a requirement that these stations that have not yet replicated their analog Grade B contours permit distant signal importation by satellite to households inside their Grade B contour but outside the broadcaster's community of license, but still within the broadcaster's Grade B contour, would achieve two benefits: it would ensure that those consumers unable to receive a DTV signal over-the-air can at least receive the HDTV feed of the same network by satellite; and it will provide additional incentive for broadcasters to replicate their Grade B contour – again to the benefit of consumers.

I. Failure to Build DTV Facilities

Despite the comprehensive transition framework created by Congress and the Commission's many efforts to accelerate it by encouraging broadcasters, equipment manufacturers and consumers to play their part in achieving a complete transition, many obstacles remain to be overcome. At the root of the problem is a vicious cycle: the lack of sufficient DTV programming discourages consumers from purchasing DTV sets, which in turn can excuse broadcasters from complying with the 2006 spectrum reclamation deadline, which perpetuates the lack of sufficient programming, and so on. Moreover, delays in the DTV transition have a ripple adverse effect on the U.S. Government's fiscal needs and the prospect of finally putting to new uses the analog spectrum that is still controlled by the broadcasters. In September 2001, EchoStar submitted a proposal that would help extricate the transition process from that vicious cycle. Allowing the satellite importation of distant HDTV network feeds in areas where the local network stations have not built over-the-air DTV facilities would encourage consumers to purchase DTV sets or converters, provide incentive for broadcasters to

² As discussed below, DBS distributors are actively seeking ways to ease the bandwidth constraints that presently prevent their offering local DTV signals.

³ Specifically, the FCC has reported that as of February 2004, over half of the 1,385 stations broadcasting a digital signal were operating pursuant to special temporary authority or experimental authority, meaning the stations are not broadcasting in accordance with their licensed parameters. See data reported on FCC's website at <http://www.fcc.gov/mb/video/files/dtvsum.doc>.

comply with the transition deadlines and reduce their ability to obtain extension of that deadline. That proposal has become all the more warranted today, because developments in the market have further eroded the rigor of Congress's transition framework.

The Balanced Budget Act of 1997 established a December 31, 2006 deadline⁴ for broadcasters' return of the analog spectrum, and provided only a limited number of grounds for extending the deadline. The most significant such ground is the so-called "15% test" or "85% rule." Under that rule, the Commission may grant an extension if at least 15% of the television households in the market served by a station requesting an extension (1) do not subscribe to a MVPD that carries at least one digital signal from each of the local stations broadcasting digitally in the market, and (2) do not have a DTV set or an analog-to-digital converter enabling them to receive the DTV signals of local broadcast stations.⁵

What Congress apparently did not, and could not, realize in 1996, is that the exception would "swallow the rule," giving broadcasters the ability to hold on to the analog spectrum indefinitely. Specifically, the structure of the MVPD market is now such that the first prong of the 15% test will almost *never* be satisfied, meaning that errant broadcasters in many markets will be able to meet one of the two prongs for holding onto the analog spectrum indefinitely. The reason is that today EchoStar and DIRECTV serve 20% of MVPD subscribers on average nationwide.⁶ Unlike cable operators, the two DBS providers cannot at this point serve local markets with their local digital signals because of bandwidth limitations.⁷ In the typical market, therefore, more than 15% of the MVPD subscribers do not subscribe to an

⁴ 47 U.S.C. § 309(j)(14)(A) (2001) ("A television broadcast license that authorizes analog television service may not be renewed to authorize such service for a period that extends beyond December 31, 2006.").

⁵ See 47 U.S.C. § 309(j)(14)(B)(iii).

⁶ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, MB Docket No. 03-172, FCC 04-5 (rel. Jan. 28, 2004) ("Tenth MVPD Competition Report"), at ¶ 65 (reporting that "DBS comprises approximately 20% of all MVPD subscribers").

⁷ DBS operators currently lack the bandwidth to expand into offering local HDTV signals while complying with their obligations for mandatory carriage of analog broadcast stations. EchoStar is, however, exploring a number of innovative options to increase its capacity to offer advanced services. Among EchoStar's efforts are its applications to deploy satellites using reduced orbital spacing (from 9 degrees to 4.5 degrees). See FCC File Nos. SAT-LOA-20030609-00113 (FCC Call Sign S2454) (June 9, 2003); SAT-LOA-20030605-00109 (FCC Call Sign S2453) (June 5, 2003); SAT-LOA-20030606-00107 (FCC Call Sign S2450) (June 6, 2003) (respectively consisting of EchoStar's applications to launch and operate DBS satellites at the 86.5° W.L., 96.5° W.L., and 123.5° W.L. orbital locations).

MVPD that carries at least one local digital signal from their local market.⁸ In addition to stalling the DTV transition by facilitating broadcasters' efforts to hold onto analog spectrum indefinitely, this loophole will slow the roll-out of local digital signals to consumers, exacerbating the "chicken and egg" problem that already threatens the transition.⁹ Stated simply, what was intended as a cumulative, two-prong test (a broadcaster has to show both requirements are not met to take advantage of the extension) has now been eroded to a one-prong test (since the broadcaster can almost always show the first requirement is not met).

The creation of the 15% test was prompted by Congress's concern that "a significant number of consumers in any given market are not left without broadcast television service as of January 1, 2007."¹⁰ It is highly unlikely, however, that Congress intended for that concern to give rise to a mechanism that would stall the DTV transition, putting on indefinite hold the auctions of reclaimed analog spectrum ordered by the statute.¹¹

⁸ Other types of MVPD services, such as wireless cable (MMDS), SMATV, and broadband service providers (overbuilders) are not a factor in this case, regardless of whether they offer local HDTV service. Their combined share of the MVPD market is less than 3% and the shares for the former two categories appear to be declining. *See Tenth MVPD Competition Report*, Appendix B, Table B-1 (MMDS has a .21% share of the MVPD market, SMATV has 1.27%, and BSPs have 1.49%).

⁹ *See* "FCC Releases Twelve Studies on Current Media Marketplace," News Release, MB Docket No. 02-277, MM Docket Nos. 01-235, 01-317, 00-244 (rel. Oct. 1, 2002), 2002 FCC LEXIS 4932 at *110.

¹⁰ *See* H.R. CONF. REP. NO. 105-217, at 576-77 (1997), *reprinted in* 1997 U.S.C.C.A.N. 176, 197.

¹¹ The Commission has noted that the first prong of the 15% test also may be "rarely satisfied in any market" because the prong appears to require that *all* stations broadcasting digitally in a market be carried by an MVPD in order to count toward the necessary market penetration. *See Second Periodic DTV Review*, 18 FCC Rcd. 1279 (2003), at ¶ 85. Yet, as the Commission acknowledged, even cable systems rarely carry every local station in a market. There are typically some stations that do not qualify for mandatory carriage and are also not carried by the cable system voluntarily, prompting the Commission to seek comment on whether "Congress intend[ed] that this prong would be very rarely satisfied in a market" *Id.* EchoStar believes that Congress could not have intended to impose on broadcasters an extension criteria they could almost always satisfy. For that reason, EchoStar agrees that the Commission should interpret the statute such that availability of the extension is more limited. *See id.* at ¶ 87 (suggesting that by interpreting the provision to limit the requirement to carriage of all DTV stations entitled to must carry, the extension would be less readily available). The problem, however, is that this interpretation does not even come into play. No matter how many HDTV stations are carried by a local cable system, broadcasters will almost always be able to invoke the

This means the second prong of the 85% test (the widespread availability of DTV sets) is now the main hope for averting perpetual extension of the digital transition deadline. In that regard, the Commission has already expressed concern as to whether a majority of U.S. television households will invest in digital televisions or converters by the transition deadline, leaving a big question mark as to whether this criterion, too, will be satisfied in time.¹² Although the Commission has acted on a number of fronts to encourage more consumers to purchase DTV sets and converters,¹³ it remains to be seen whether these efforts will boost the DTV set/converter penetration rate, still hovering in the single digits, to more than 85% in less than three years' time.¹⁴

There is, however, an immediate, practical solution to help ensure that the digital transition does not continue to proceed at the current snail's pace. In markets where a local broadcaster has not constructed DTV facilities (whether by taking advantage of the extension under the 15% percent test, obtaining an extension on another ground, or mere lack of diligence), satellite TV providers would fill the void by offering the network's HDTV feed via satellite. This can be done by requiring such stations to grant waiver requests from consumers located in the relevant DMA for the narrow purpose of allowing these consumers to receive the distant HDTV feed.

fact that DIRECTV and EchoStar together have a share of more than 15% and do not provide local HDTV stations.

¹² The General Accounting Office has expressed skepticism that the 85% criteria could be satisfied by 2006, noting "a consensus among most industry experts" that the 85 percent rule will probably not be met in most markets by 2006." *Telecommunications: Additional Federal Efforts Could Help Advance Digital Television Transition*, General Accounting Office Report, GAO-03-7, November 2002 ("GAO DTV Report"), at 11.

¹³ For example, the Commission adopted rules to permit TVs to built with "plug-and-play" functionality for one-way digital cable services without the need for set-top boxes, adopted a digital broadcast content protection mechanism, and mandated that all U.S.-manufactured TV receivers of a certain size contain DTV tuners by July 1, 2007. *See Implementation of Section 304 of the Telecommunications Act of 1996*, 18 FCC Rcd. 20885 (2003) (plug-and-play rules); *In the Matter of Digital Broadcast Content Protection*, 18 FCC Rcd. 22940 (2003) (broadcast flag rules); *In the Matter of Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 16 FCC Rcd. 5946 (2001), ¶ 40 (deadline for DTV tuners in televisions), *on reconsideration*, 16 FCC Rcd. 20594 (2001).

¹⁴ For example, the GAO reported that in 2001, sales of televisions that included a tuner capable of receiving digital broadcast signals, when combined with sales of set-top DTV tuners, still represented less than 1% of all television sets sold. GAO DTV Report at 17-18.

II. Failure to Replicate Grade B Contours

Each DTV channel allotment was chosen by the Commission to allow it to match (*i.e.*, replicate) as closely as possible the Grade B service contour of the analog channel with which it is paired.¹⁵ The Commission has explained that it “took this approach ‘to ensure that broadcasters have the ability to reach the audience that they now serve and that viewers have access to the stations that they can now receive over the air.’”¹⁶

The Commission, however, declined to make full service replication mandatory, and moreover, elected not to impose an immediate deadline for full replication, allowing broadcasters to more gradually transition into providing DTV service by starting with lower power service. The Commission tried to create an incentive for full replication through a use-or-lose system – stations that fail to replicate their analog service area by a date certain will lose DTV interference protection for the unreplicated areas and ultimately, their license to serve the unreplicated areas. But the problem with that incentive is that the proposed deadlines are simply too remote: the Commission’s *Second Periodic DTV Review* proposed a replication deadline of July 1, 2005 for top-four network affiliates in the 100 largest TV markets, and July 1, 2006 for all other DTV licensees.¹⁷

The result? Today, there are many stations that have taken advantage of the replication flexibility by operating at significantly lower power than would be necessary to extend DTV service beyond their community of license to their analog Grade B service contour.¹⁸ The consequence is that many of the viewers that may currently be predicted to be served by the analog signal of these stations are deprived of the station’s digital signal. These viewers face the same unfortunate situation as those in markets where a station has completely failed to build out – they receive no over-the-air digital broadcast of that network. Moreover, even if the Commission were to adopt the proposed replication deadlines, the lack of DTV service to these consumers would continue for at least one or two years, and, if the use-it-or-lose-

¹⁵ *In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Sixth Report and Order, 12 FCC Rcd. 14588, 14605 (1997) (“Sixth DTV Report and Order”), *on reconsideration*, 13 FCC Rcd. 7418 (1998), *on further reconsideration*, 14 FCC Rcd. 1348 (1998), *recon. dismissed*, DA 99-1361 (rel. July 12, 1999), *recon. dismissed*, FCC 00-59 (rel. Feb. 23, 2000).

¹⁶ *Second Periodic DTV Review*, 18 FCC Rcd. 1279, at ¶ 30 (quoting Sixth DTV Report and Order).

¹⁷ *Id.* at ¶ 33.

¹⁸ According to data reported on FCC’s website, as of February 2004, over half of the 1,385 stations broadcasting a digital signal were operating pursuant to special temporary authority or experimental authority, meaning the stations are not broadcasting in accordance with their licensed parameters). See <http://www.fcc.gov/mb/video/files/dtvsum.doc>.

it incentive proves inadequate, these consumers would continue to lack DTV service for many years beyond the replication deadlines.

To increase the prospects for full replication, the Commission should provide that, after a grace period of three months from the effective date of the rules, broadcasters that fail to replicate their analog Grade B contour will be required by the Commission to grant waiver requests permitting distant HD signal importation by satellite to any households outside their community of license that are predicted as served by the station's analog signal. Specifically, such stations should be required to grant distant signal waivers to any household that is predicted to be served by the analog Longley-Rice model outside the station's community of license. The analog Longley-Rice predictive model was used by the Commission to help determine the parameters of DTV service areas in developing the DTV Table of Allotments. *See Memorandum Opinion and Order on Reconsideration of Sixth DTV Report and Order*, 13 FCC Rcd. at 7488. Thus, although it is important that the Commission begin developing a predictive model for DTV broadcast signals with all deliberate speed to facilitate definition of "unserved households" in the digital context, implementation of this proposal need not await completion of a new DTV predictive model. The same service areas developed for the DTV Table of Allotments can be employed here to define the boundaries of the Grade B contour where DTV service should be replicated.

EchoStar's proposal achieves the dual benefits of ensuring that those consumers unable to receive a DTV signal over-the-air at least receive an HDTV feed of the same network by satellite, as well as providing additional incentive for broadcasters to replicate their Grade B contour – again to the benefit of consumers.

In sum, the Commission's support of distant network HDTV service through exercise of its conditioning authority will ensure that the progress of the digital transition is not halted by holdout stations. Consumers that would otherwise be left in the dark will have access via satellite to the mesmerizing video quality that HDTV brings, which in turn will encourage the purchase of DTV sets and other digital equipment. Broadcasters that were previously unmoved by the FCC's DTV buildout deadlines and sanctions will be faced with competition in providing their HD network signals to viewers in their area, giving them concrete incentive to construct DTV facilities and serve the entirety of their current viewing area. And ultimately, analog spectrum will be reclaimed more rapidly, allowing the public to reap the benefits of having the spectrum used for new advanced and public safety services, as well as the billions of dollars the public stands to gain from auction of the spectrum.¹⁹

¹⁹ The need for action to speed reclamation of the analog spectrum is acute. Congress has already warned that delay in return of portions of the spectrum used for broadcasting reduces both the amount of money that auctions are likely to produce and the probability that the spectrum will be purchased by the entities that will put it to its most productive use. *See* GAO DTV Report at 9 (citing the Auction Reform Act of 2002, Pub. L. No. 107-195, 116 Stat. 715 (2002)).

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Respectfully submitted,

A handwritten signature in dark ink, reading "Pantelis Michalopoulos" followed by a stylized monogram "hbb".

Pantelis Michalopoulos
Rhonda M. Bolton

Counsel for EchoStar Satellite L.L.C.

cc: Commissioner Kathleen Q. Abernathy
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